WONG POH CHING v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) June 19, 1956]

[Ipoh — Criminal Appeal No. 31 of 1956]

Prevention of Corruption Ordinance, 1950, s. 3(b) — Charge — Charge incorporating ss. 116 and 161 Penal Code — Whether charge is bad as to make it impossible for any conviction — No sanction obtained under Prevention of Corruption Ordinance.

Criminal Procedure Code (F.M.S. Cap. 6), ss. 256 and 422 — Appellant's knowledge of nature of charge — No objection taken thereto at trial — Not misled by error in charge — No miscarriage of justice.

The appellant was arrested for an offence under the Emergency Regulations. It was alleged that on his arrest he offered a sum of $10 to a police corporal so as to induce the latter to release him. On those facts he was charged as follows: "That you on 25.1.56 at about 7.10 a.m. at 98¾ mile-stone Grik/Lenggong Road, in the District of Upper Perak, abetted an offence of offering illegal gratification other than legal remuneration, to wit, by offering cash $10 to S.C. Cpl. 35320 as a motive for forbearing to do an official act, to wit, to release you after being arrested for an offence alleged to have been committed under Reg. 15(i) & Reg. 18(i) of E.R. (R.A.) 1948 and you thereby committed an offence punishable under ss. 116 and 161 of the Penal Code."

The charge followed the wording of section 3(b) of the Prevention of Corruption Ordinance, 1950, but concluded by stating that, as set out above, the "offence was punishable under ss. 116 and 161 of the Penal Code." No sanction was obtained for a prosecution under section 3(b) of the Prevention of Corruption Ordinance. On that charge, the appellant was convicted and sentenced to 3 months' imprisonment from which decision he appealed.

Held: (1) on the facts, as the appellant was not in any way misled by the error in the statement of the statutory provision under which he was charged nor was any miscarriage of justice, a conviction in such circumstances by the trial Court was not necessarily fatal;

(2) although the charge could not have supported a conviction under the Prevention of Corruption Ordinance as the required sanction thereunder was not obtained, it was not necessarily bad as a charge under the Penal Code containing as it did every ingredient necessary for an offence under sections 116 and 161.

Case referred to:—

(1) *Spiers v. Johiuddin* A.I.R. 1932 Cal. 461.

MAGISTRATE'S APPEAL.

D. R. Seenivasagam for the appellant.

Abdul Aziz bin Mohd. Zain (Federal Counsel) for the respondent.

Thomson J. (delivering oral judgment): — The facts of this case are not in dispute, or rather I should say they are not in dispute at this stage. They are that the appellant was arrested somewhere near Grik for a comparatively unimportant offence under the Emergency Regulations and that he offered a sum of $10 to a police corporal to induce the corporal to release him. These were the facts alleged against him and these were the facts which the learned President found to be proved. On these facts he was charged in the Sessions Court at Grik on the following charge:—

"That you on 25.1.56 at about 7.10 a.m. at 98¾ mile-stone Grik/Lenggong Road, in the District of Upper Perak, abetted an offence of offering illegal gratification other than legal remuneration, to wit, by offering cash $10 to S.C. Cpl. 35320 as a motive for forbearing to do an official act, to wit, to release you after being arrested for an offence alleged to have been committed under Reg: 15(i) & Reg: 18(i) of E.R. (R.A.) 1948 and you thereby committed an offence punishable under Sections 116 and 161 of the Penal Code."

On that charge he was convicted and sentenced to three months imprisonment.

Now when I read the words of that charge, quite frankly I am amazed that anybody could produce, what I can only describe, as such a *forensic monstrosity.* I am amazed, too, that from the beginning to the end of the trial its defects should have apparently escaped the notice and certainly escaped the criticism both of the learned President and counsel who appeared for the Accused. There are well settled precedents for this type of charge. I should have thought that the obvious and easy course for anyone concerned in such prosecutions was to stick to these well settled precedents and, as I say, I am amazed that anyone should have laboured to produce such an extraordinary aberration as the present charge. It would appear that whoever was responsible for drafting it followed the wording of section 3 (b) of the Prevention of Corruption Ordinance reasonably closely and then for some extraordinary reason concluded by stating that the offence as thus set out was punishable under sections 116 and 161 of the Penal Code.

But while that criticism of the charge is to my mind abundantly called for and while I hope it will be conveyed to everyone concerned in the case, I am not at all sure that it is conclusive of the question as to whether the charge is so bad as to make it impossible for any conviction to have been had upon it.

In the first place, I do not think it is necessarily bad as a charge under the Prevention of Corruption Ordinance. I have considered a number of Indian cases during the lunch hour and the one that comes nearest to the point is the case of *Spiers v. Johiuddin*[1] which seems to be some authority for saying that an error in the statement of the statutory provision under which the party is charged is not necessarily fatal. In the present case, of course, it does not help the conviction that the charge might have been a good one under the Prevention of Corruption Ordinance because no sanction had been had for prosecution under the Ordinance.

But I am not at all sure that it is necessarily bad as a charge under the Penal Code. Using the English language in the ordinary way it seems to me that the

wording does include every ingredient for an offence under sections 116 and 161 of the Penal Code except the ingredient that the offence of receiving the bribe was not in fact committed.

Now on a consideration of the relevant sections of the Code I do not think that that is a necessary ingredient of any offence. It is merely a circumstance affecting the maximum quantum of punishment. Abetment of an offence is defined in section 108 and the succeeding sections to my mind only deal with the question of punishment for abetment in various circumstances. For example, section 109 deals with the case where the offence abetted is committed in consequence of the abetment, whereas section 116 deals with the case where the offence abetted is not committed in consequence of the abetment. But whether the case falls within section 109 or section 116 the abetment is still an offence and it is only the question of the maximum punishment that is affected in any way by the distinction between section 109 and section 116.

That being so I am compelled to agree with the contention of Che Abdul Aziz that the matter is to be considered in the light of sections 256 and 422 of the Criminal Procedure Code. And considering it in the light of these sections I can see no ground whatever for thinking that the Accused was in any way misled or that there has been any miscarriage of justice. He knew all along what was alleged against him, that he had offered $10 to a police corporal to release him, and his defence was that he did not offer $10 to the police corporal, that it was all a misunderstanding. How then he can claim to have been misled in any way by an inartistically worded charge which has afforded and, quite properly, scope for a great deal of criticism from counsel this morning but the defects of which could hardly have been apparent to him, I wholly fail to see. I am to some extent fortified in that view by the fact that at the trial he was represented by experienced counsel and I have no doubt that if counsel had felt in the slightest way embarrassed by the wording of the charge he would have made some point of it in the course of the trial. For these reasons I think the first ground of appeal must fail.

As regards the second ground it is this. There was put in evidence against the Accused at the trial a statement which it is alleged he made to the Police under section 13 of the Prevention of Corruption Ordinance. In case the matter should go any further, I have no hesitation in expressing my opinion that the learned President was clearly influenced by that statement in convicting him. Here it is said that it was not proved, as of course it had to be proved, that the caution provided for by section 13(4) (a) (ii) was administered. If it was not administered then, of course, the statement should not have been admitted. As is always the case I have not the benefit of a verbatim note of what happened at the trial. I have to decide the matter on the material before me which is the President's note. I agree that note is not as clear as it might be but I have come to the conclusion that it does shew that the caution typed at the head of the statement which was actually produced was in fact administered. Again I am fortified in that conclusion by the conduct of the defence. At that stage of the trial, that is at the stage when the statement was tendered, counsel was present on behalf of the Accused and he raised no question of admissibility. To my mind that goes to shew that counsel who after all listened to the evidence when it was given placed the same construction upon it as I have placed upon the President's note.

The appeal will be dismissed.

Appeal dismissed.

Solicitors: *S. Seenivasagam & Sons.*

YEOH TAT BENG v. LEONG CHIEW

[O. C. J. (Good J.) February 11, 1957]

[Ipoh — Civil Suit No. 2 of 1957]

Partnership — Appointment of an interim receiver and manager of the partnership business — Principles on which a receiver will be appointed.

By an agreement in writing made on May 20, 1955, the plaintiff and the defendant agreed to enter into partnership under the name and style of Mun Fook Mining Kongsi to mine for tin ore and other minerals on a piece of mining land close to Taiping. Clause 6 of the agreement provided that the partnership should be managed by the defendant and that the treasurer should be the plaintiff. Clause 8 of the agreement declared "The Bankers of the partnership shall be the Chartered Bank at Taiping . . . . and all moneys and securities for moneys of the partnership . . . . shall be kept deposited and operated with the said Bankers by Yeoh Tat Beng." By the terms of a permit to mine given on February 8, 1956 by Tekka-Taiping Ltd. to the defendant, the defendant was permitted to mine for tin ore for a period of one year upon a piece of mining land in the Mukim of Assam Kumbang. The permit, a renewal of an earlier permit, although standing in the name of the defendant, was a partnership asset. On April 7, 1956 the defendant received a cheque drawn in his favour for the sum of $4,076.32 being the proceeds of sale of tin ore won by the partnership from the land held under the permit to mine. The defendant in breach of clause 8 of the agreement paid this cheque into his own private and personal banking account. On December 21 and 28, 1956, January 7 and 17, 1957 the defendant received further cheques being proceeds of sale of tin ore won by the partnership from the land held under the permit to mine, and in each case in breach of clause 8 paid these cheques into his own private and personal banking account.

For the reasons stated in his judgment the learned Judge considered that these grounds were sufficient to justify the appointment of an interim receiver and manager subject to the conditions set out at the end of his judgment.